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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. MICAH BENJAMIN MINOR, Defendant and Appellant.	C057609 (Super. Ct. No. CM020547) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on September 8, 2010, be modified as follows:

1. The first paragraph of part II, beginning at the bottom of page 7 with "Probation is the" and ending on page 8 with "(*People v. Olguin* (2008) 45 Cal.4th 375, 379.)," is modified to read as follows:

> Probation is the "suspension of the imposition or execution of a sentence and the order of conditional and revocable release in the community under the supervision of a probation officer." (§ 1203, subd. (a).) A court may grant probation "for a period of time not exceeding the maximum possible term of the sentence." (§ 1203.1, subd. (a).) "Grant of probation is, of course, qualitatively different from such traditional forms of punishment as fines or imprisonment. Probation is neither 'punishment' [citation] nor a criminal 'judgment' [citation]. Instead, courts deem probation an act of

clemency in lieu of punishment [citation], and its primary purpose is rehabilitative in nature [citation].” (*People v. Howard* (1997) 16 Cal.4th 1081, 1092.) “‘Probation is generally reserved for convicted criminals whose conditional release into society poses minimal risk to public safety and promotes rehabilitation. [Citations.] The sentencing court has broad discretion to determine whether an eligible defendant is suitable for probation and, if so, under what conditions. [Citations.] The primary goal of probation is to ensure “[t]he safety of the public . . . through the enforcement of court-ordered conditions of probation.” (Pen. Code, § 1202.7.)’ (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120 . . . .) Accordingly, the Legislature has empowered the court, in making a probation determination, to impose any ‘reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer . . . .’ (Pen. Code, § 1203.1, subd. (j).)” (*People v. Olguin* (2008) 45 Cal.4th 375, 379.)

2. On page 17, in the second sentence of the first full paragraph, the word “procedural” is to be inserted between the words “the” and “due” so that the sentence reads:

> Courts have taken a more restrictive view of the procedural due process rights of probationers facing an extension of their probationary period.

3. The paragraph commencing in the middle of page 19 with “The approach taken by the court” and ending at the top of page 20 is modified to read as follows:

> The approach taken by the court in *Skipworth* has been applied in later federal cases. (See *United States v. Carey* (8th Cir. 1977) 565 F.2d 545, 547 [“[A] mere noncustodial period of supervision to a term within the statutory limits [does not] implicate[] a liberty interest sufficient to require a pre-extension hearing as a constitutionally commanded right”]; *United States v. Cornwell* (5th Cir. 1980) 625 F.2d 686, 688 [“[E]xtension of ‘a non-custodial period of supervision to a term within the statutory limits [does not] implicate a liberty interest sufficient to require a preextension

hearing as a constitutionally commanded right,'" quoting *Skipworth*, *supra*, 508 F.2d at pp. 601-602]; *Forgues v. United States* (6th Cir. 1980) 636 F.2d 1125, 1127 ["Probation . . . is a non-custodial supervisory period far less onerous to the probationer than the incarceration which results from the revocation of probation . . . . [¶] . . . extension of 'a non-custodial period of supervision to a term within the statutory limits (does not) implicate a liberty interest sufficient to require a preextension hearing as a constitutionally commanded right.'"]; *United States v. Silver* (9th Cir. 1996) 83 F.3d 289, 292 [holding probation extension does not result in "a liberty interest [being] so infringed as to require this court to call for additional protections as per the Due Process Clause"].)

4. On page 21, the first two sentences of the paragraph commencing with "Thus, the weight of" are modified to read as follows:

> Thus, the weight of federal and state authority holds that the procedural due process protections applied by the Supreme Court in *Morrissey*, *Gagnon*, and *Black* to parole and probation revocation proceedings do not apply to probation extension proceedings. Nonetheless, we recognize the issue is not beyond debate.

5. On page 22, immediately preceding the paragraph beginning with "The essence of procedural due process," a new paragraph is inserted as follows:

> The issue for us, however, is not whether conditions of probation so restrict individual liberty that prior notice and hearing is required before probation can be extended; our Legislature has resolved that issue in a statute that sets forth in relative detail defendant's right to notice and hearing. (§ 1203.2, subd. (b).) *Skipworth* and the crush of cases holding that federal procedural due process rights of notice and hearing do not apply to probation extension hearings are not a bar to defendant's notice and hearing claim. Rather, *Skipworth*'s significance to the present case lies in its implicit rejection of defendant's claim that federal due process protections afford him a right of cross-examination and prohibit reliance on hearsay in the hearing afforded by California law. If there is no

constitutional right to notice and hearing in the first instance, it is difficult to conceive of a constitutional obligation to consider only the testimony of sworn witnesses or a constitutional right of cross-examination, let alone notice of the type urged by defendant.

6. After the sentence ending with "afforded by California law" in the new paragraph added pursuant to modification 5 of this order, add as footnote 6 the following footnote, which will require renumbering of all subsequent footnotes:

> [6] Nonetheless, defendant argues *Skipworth* rests on a very shaky foundation in light of the decision's reference to outdated cases and repealed statutes. Defendant notes in particular that *Skipworth* cites to *United States v. Squillante* (S.D.N.Y. 1956) 144 F.Supp.494 for the proposition that federal judges had broad powers to extend probation expressly granted by statute (18 U.S.C. former § 3651); however, this statutory authority has been repealed and always stood in stark contrast to Penal Code section 1203.2 in this state, which requires a change of circumstances. While we applaud his legal scholarship, defendant's efforts to discredit *Skipworth* are unavailing. Though the statutory underpinnings of *Skipworth* are not the same as the present case, the constitutional considerations are. *Skipworth*'s holding is cited with approval under various state statutory schemes, and there is no indication that the subsequent repeal of the federal statute cited in *Squillante* has affected the persuasiveness of *Skipworth*'s constitutional analysis. The decision continues to be cited with approval. (See, e.g., *Andrews v. State* (Mo.Ct.App. 2009) 282 S.W.3d 372, 379-381; *People v. Hotle* (Colo.Ct.App. 2008) 216 P.3d 68, 70.)

7. On page 23, in the first sentence of the paragraph beginning with "Thus, the People were not required," insert the word "timely" between the words "to" and "turn" so the sentence reads as follows:

> Thus, the People were not required to prove defendant's "level of personal responsibility" or "level of self discovery," or to explain why the failure to timely turn in eight assignments constitutes a changed circumstance.

8. On page 25, the first full paragraph, beginning with the words "Once it is determined," is modified to read as follows:

> "Once it is determined that [the guarantee of] due process applies, the question remains what process is due." (*Morrissey*, *supra*, 408 U.S. at p. 481.) The quantum and quality of due process required under specific circumstances varies. Even in revocation proceedings, a defendant is not entitled to the full range of due process rights associated with a criminal trial. Due process requires only that the revocation proceedings be conducted in a fundamentally fair manner. In *Gagnon*, the court emphasized that in parole revocation proceedings it "did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence." (*Gagnon*, *supra*, 411 U.S. at p. 782, fn. 5.) More generally, "The primary purpose of procedural due process is to provide affected parties with the right to be heard at a meaningful time and in a meaningful manner. Consequently, due process is a flexible concept, as the characteristic of elasticity is required in order to tailor the process to the particular need. [Citations.] Thus, not every situation requires a formal hearing accompanied by the full rights of confrontation and cross-examination. [Citation.] 'What due process does require is notice reasonably calculated to apprise interested parties of the pendency of the action affecting their property interest and an opportunity to present their objections. [Citation.] "'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts." [Citation.] The extent to which due process protections are available depends on a careful balancing of the interests at stake. . . .' [Citation.]" (*Ryan v. California Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048, 1069-1072.)

9. At the end of the last sentence in the paragraph immediately preceding the heading "Disposition" on page 30, add as footnote 8 the following footnote:

> [8] In his petition for rehearing, defendant insists that we are obliged "to provide needed guidance of just what is required with regard to [a] request to extend

probation." But we are not the Legislature. Our task is not to write guidelines on the extension of probation but to decide individual cases based on the facts presented to us. Here, we conclude that, consonant with sections 1203.2, subdivision (b) and 1203.3, defendant was provided notice and a hearing before his probationary period was extended. A probation progress report provided notice of the request for the proposed extension of probation and the basis for the request. The court also received information at the hearing from a probation officer. The court provided defendant's counsel with an opportunity to be heard, but he declined and made no request to call witnesses. Referring to the information provided by the probation officer and contained in the probation progress report, the court granted the request, an implicit finding that the probation office had met its burden of establishing grounds for modification of probation. We reject defendant's argument that an extension of probation must in every instance be preceded by a formal pleading and the sworn testimony of witnesses who are called and made subject to cross-examination. Neither sections 1203.2 and 1203.3, nor the Constitution, require such. Because defendant was accorded notice and a hearing prior to the expiration of his probation, we have no occasion to consider whether the notice and hearing requirements can be met by notice and hearing after the expiration of probation.

There is no change in the judgment.

Defendant's petition for rehearing is denied.

BY THE COURT:

BLEASE, Acting P.J.

SIMS, J.

RAYE, J.